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SHOULD THE DISTRICT COURTS HAVE JURISDICTION
OVER PRE-AWARD CONTRACT CLAIMS?
A CLAIM FOR THE CLAIMS COURT

A Thesis

Presented to

The Judge Advocate General's School, U.S. Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

by Captain John J. Short, JAGC
United States Army

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by Captain John J. Short

ABSTRACT: This thesis briefly examines the jurisdiction of the federal district courts and the United States Court of Claims over pre-award contract claims before the Federal Courts Improvement Act of October 1, 1982, the purpose of that Act, and post-act jurisdiction of the federal district courts and the United States Claims Court. The legislative history and the language of the Federal Courts Improvement Act itself as well as the interest of the public in a sound procurement system raise question as to the appropriate jurisdiction of these courts. This thesis concludes that jurisdiction over pre-award government contract claims should rest in the United States Claims Court exclusive of the federal district courts.

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I. INTRODUCTION

The purpose of government contracting is to obtain needed supplies and services in a timely manner at a reasonable price. Government contracting also promotes a variety of public policies including support for small business¹ and support for labor surplus areas.²

Contracting with the federal government is also a lucrative undertaking. Purchases by the Department of Defense (DOD) total approximately \$170 billion annually.³ There are over 165,000 DOD employees, both civilian and military, working each day on an average of 56,000 contract actions, i.e. over 15 million contract actions annually.⁴ Competition for these contract dollars is keen and contractors look for a contract award that is made in compliance with applicable law and regulation.

Contracting with any agency of the Government is done by one of two basic methods, sealed bidding⁵ or negotiation.⁶ In the sealed bidding process the Government's needs are made known through an invitation for bids (IFB),⁷ and in negotiated acquisitions through a request for proposals (RFP).⁸ Those wishing to compete for the procurement submit their bids or proposals for evaluation by the procuring agency. After the evaluation of offers the contract is awarded in accordance with the criteria set forth in the IFB or RFP and the Federal Acquisition Regulations.⁹

It is the right of the bidder to have his bid honestly considered and it is the obligation of the government to consider all bids in good faith and in compliance with procurement regulations.¹⁰ Therefore, in both procurement methods an interested party may object to the proposed award of the contract.¹¹ The protesting party has as many as four options in filing the protest. An interested party may protest to the agency itself¹² or to the General Accounting Office.¹³ Another option is to seek judicial review in either a Federal District Court¹⁴ or the United States Claims Court.¹⁵ If the procurement is of automatic data processing equipment or related items such as software or telecommunications under 40 U.S.C. 759 the contractor may, alternatively, complain to the General Services Board of Contract Appeals.¹⁶

As the government seeks ever greater competition through its requests for proposals and invitations for bids the number of potential disappointed bidders also becomes ever larger. Imagine a multi-million dollar contract for pistols. A dozen interested contractors may submit bids. If the contract is awarded to only one bidder there are then eleven disappointed bidders, each with the capability to act as a private attorney general seeking to satisfy the public interest by obtaining review of the agency's procurement procedures. This could mean eleven separate lawsuits in eleven separate federal district courts.¹⁷ From the perspective of each of the eleven disappointed bidders it convenient to file in a local district court.

However, from the perspective of the public's interest, how convenient and cost-effective is it to expend government resources in eleven different jurisdictions on basically the same matter?

The public, too, has a stake in government contracting. The public has a dual interest in a contracting system which is effective in part because of judicial scrutiny and an interest in an over-all cost-effective system. Besides being an element in a cost-effective system, the judicial review process should itself be cost-effective. Having more than one court available to review these contract controversies leads to expenditures of the public's resources in money and human effort, in defense of the government's procurement decisions.¹⁸

The U.S. Army's recent procurement of a 9mm pistol as the new standard sidearm of the U.S. Armed Forces illustrates how the present system of judicial review of government contract actions may require the expenditure of large sums of the public's money in defending multiple actions on the same contract.

This thesis will examine how the judicial review process came to be as it is today and will offer some recommendations for improvement.

II. THE 9mm PISTOL PROCUREMENT

A. HISTORY OF THE PROCUREMENT¹⁹

The history of the 9mm pistol procurement covers many years. The .45 caliber pistol had been the standard sidearm of the U.S. Armed Forces since 1911. Following World War II very few new .45 caliber pistols were purchased. "Spares for repairs", the purchase of spare parts to repair pistols already in stock was the order of the day for quite some time. Consequently, pistols became unserviceable and had to be removed from unit supply inventories without being replaced. Additionally, a variety of .38 caliber pistols used primarily by pilots and certain military law enforcement officers had been acquired over the years. Congress determined that it would be more advantageous to have one standard sidearm to be used by all branches of the military service including the Coast Guard. The United States Army was designated as the procurement service for the 9mm pistol. A product manager (PM) position for the procurement was established at Headquarters, U.S. Army Armament, Munitions, and Chemical Command (AMCCOM) located at Rock Island Arsenal (RIA), Rock Island, Illinois. This office and staff consisted of five full-time employees including the PM.

In 1981 a group of persons knowledgeable in small arms and representing all branches of the service met and drafted a Joint Service Operational Requirement (JSOR). This JSOR set the technical requirements of the pistol to be purchased.²⁰ The Army then issued an RFP which drew responses from only four manufacturers, none of whom could meet the requirements.

The DOD appropriation for Fiscal Year 1982 included \$1.9 million for the testing and evaluation of 9mm pistols. In September, 1983 the Army issued a draft Request For Test Samples (RFTS)²¹ to various manufacturers including those who had responded to the 1981 RFP. The RFTS was prepared by a group of twenty-nine people representing DOD and each branch of the service. About one month after the RFTS was issued, a conference for all potential bidders was held in Rock Island, Illinois. At this conference the PM and his staff explained the RFTS program and answered questions from those in attendance.²² The Smith & Wesson Company (Smith & Wesson) and SACO Defense System Division of the Maremont Corporation (SACO) were represented at this meeting. No one in attendance at the October conference objected either to the Army's plan to test and evaluate through the RFTS program, or to the characteristics or criteria to be used for candidate weapon evaluation. The RFTS was issued in final form in November, 1983.

Eight firms each submitted thirty 9mm pistols and certain other required materials in response to the RFTS.²³ Testing and evaluation was conducted under the RFTS program from February 1 to October 31, 1984.

Initial inspection and adverse condition tests were conducted at Aberdeen Proving Ground, Maryland (APG) by a group of forty-two people on various dates from February 15 to August 27, 1984. Firing pin energy and endurance testing was conducted by a group of twenty-four people at Fort Dix, New Jersey on various dates between April 27 and July 11, 1984. Known-distance and combat range firing was done by a total of one hundred and twenty-seven personnel at Fort Benning, Georgia on various dates between April 23 and June 26, 1984. The FT Benning group was comprised of members of the different branches of the military service most of whom were permanently assigned elsewhere. This meant they had to travel back and forth between their duty stations and the test sites during the test periods.

Test results were gathered at the various test sites and forwarded to AMCCOM where a Test Evaluation Board²⁴ (TEB) compiled and analyzed the raw data. The TEB was comprised of no less than fifteen military and civilian representatives of the military services serving at different permanent duty stations. Each of the members had knowledge of small arms. The TEB was responsible for drawing conclusions from the data and then forwarding its findings, conclusions and recommendations on to the Technical Advisory Committee²⁵ (TAC).

The TAC was a six member group of senior representatives of the services each of whom was also knowledgeable in the area of small arms. The TAC members were also assigned to different permanent duty stations and came together for evaluation of material presented by the TEB. The TAC reported to the Source Selection Authority (SSA) who had the exclusive authority and responsibility to determine elimination of a manufacturer from competition and to determine the candidate to whom award would be made.

In May, 1984 an RFP for the purchase of 9mm pistols was issued only to those bidders who responded to the RFTS issued in November, 1983. At stake for the competing contractors was a multi-year contract for over 315,000 pistols at an estimated cost of some seventy-five million dollars over five program years.²⁶ In addition to the actual sale of the pistols to the U.S. Government, the winner could also look forward to an expanded share of the world and domestic markets for its firearms as well as possible new product lines: e.g. holsters and accessories. The eight competitors in the procurement included Beretta U.S.A. Corporation (Beretta), Smith & Wesson, and SACO. The candidate weapons were put through rigorous testing. Some manufacturers voluntarily withdrew from the competition while others had been eliminated when their weapons failed to meet the announced specifications. The remaining competitors in the 9mm procurement "awaited the Army's decision as if it were the Last Judgment, for one very important reason: a military contract is the ultimate endorsement, the stamp of the champ."²⁷

B. THE LITIGATION

On September 18, 1984 Smith & Wesson was notified that the SSA had eliminated it from the competition because the Smith & Wesson candidate weapon failed two of the mandatory tests. SACO was one of two finalists in the competition, but lost out to Beretta. Both the Smith & Wesson and SACO companies filed suit against the Army. These suits resulted in great expense to the government. What are the resources of the government and how are they expended? An overview of Smith & Wesson v. United States²⁸ and SACO v. Weinberger²⁹ cases will be illustrative of the point.

Smith & Wesson filed suit in the Federal District Court for the District of Massachusetts in Springfield, Massachusetts on October 23, 1984. Smith & Wesson alleged that they had been wrongly eliminated from the competition because the Army had violated its own test programs and procedures and the applicable procurement laws and regulations. Smith & Wesson sought to permanently enjoin the Army from proceeding with the 9mm pistol procurement unless and until Smith & Wesson was reinstated. The Army filed a motion to transfer the case to the United States Claims Court. On December 4, 1984 the district court granted the transfer motion.³⁰ Smith & Wesson appealed. On March 20, 1985 the First Circuit Court of Appeals issued a writ of mandamus ordering the district court to recall the case for trial. Trial on the merits was held in Springfield on

April 29 and 30 and May 1, 1985. On June 6, 1985 the district court ruled in favor of the Army. On February 4, 1986 the First Circuit upheld the decision in favor of the Army.

With the filing of their challenge Smith & Wesson set in motion a defense team that would involve legal offices in Washington, D.C., Springfield, and RIA. An Assistant U.S. Attorney (AUSA) in Springfield would be the principal representative of the government. The focal point for information regarding the testing and evaluation program was RIA, the "home office" of the (PM). Because this was a procurement case all communications between RIA and Springfield went through the General Litigation Branch (LTG) of the Litigation Division, Office of The Judge Advocate General (OTJAG).³¹ At a minimum there were three attorneys working full time on the case from the moment it was filed. As the case progressed and filing deadlines drew close direct communication between RIA and Springfield was authorized, however, LTG had to be kept abreast of developments in order to respond to DA and DOD inquiries and to lend assistance to the field.

At the time the Smith & Wesson suit was filed testing was just about completed and evaluation of the remaining competitors was proceeding. Initial discovery requests in this case consisted of over thirty-eight interrogatories and twenty-nine requests for "documents and things". In order to respond to the discovery requests it was first necessary to collect in

one place all the information along with knowledgeable personnel to decipher it. To that end a two day meeting (fifteen hours per day) was called on extremely short notice. At that meeting, held at RIA, approximately twelve to fifteen people were gathered from all test sites along with copies of all test and test-related documents still on file. Civilian grades ranged from GS-11 to GS-15 with the military ranks being Captain, Major and Lieutenant Colonel. The volume of work required a second RIA attorney be assigned to the case on a part-time basis. Once the documents had been collected and identified responses to the interrogatories could be drafted and reviewed. While these responses were being readied another nine to twelve attorneys were engaged in redacting documents.³² Before final release pursuant to court order was made, one copy of each document, both redacted and unredacted (comprising some six cartons of material), was hand-carried by an RIA attorney to LTG for briefing of LTG attorneys who in turn would brief the AUSA and interested DOD and Department of the Army personnel who had a need to know.

As preparation for trial progressed the government witness list was whittled down to seven people. These individuals were interviewed at RIA and reports were sent to LTG and Springfield. On the eve of trial the seven witnesses, one RIA attorney, one LTG attorney, one Department of Justice (DOJ) attorney and the AUSA met in Springfield. The trial lasted two and one-half days; post-trial work was minimal.

Nothing that was done in the preparation and trial of this case was out of the ordinary. The cost to the government in terms of salaries for attorneys and witnesses, document reproduction, and travel and lodging expenses was exceedingly high. All for a case where the plaintiff made " ... so many blunderbuss charges against the accuracy and validity of the ... tests that it [was difficult for the court] to sort out the duds from the live charges."³³

It is true that these expenses would have been incurred whether the trial was held in the district court in Springfield or in the Claims Court in Washington. The added expense for the government came with the filing of the SACO lawsuit.

SACO filed suit in the Federal District Court for the District of Maine in Portland, Maine on March 28, 1985. SACO alleged that the Army had 1) misapplied the evaluation criteria as to cost and expected service life (endurance), and 2) failed to conduct meaningful negotiations as required by law and regulation. SACO sought to have the court set aside the award of the contract and order the Army to re-evaluate SACO's and Beretta's proposals. The court denied a motion for a preliminary injunction on April 8, 1985 and issued an order regarding discovery on October 4, 1985. Discovery was completed near the end of December, 1985 and cross-motions for summary judgment were filed in January, 1986. On February 20, 1986 the Army's motion for

summary judgment was granted. On December 3, 1986 the First Circuit affirmed the summary judgment in favor of the Army.

One of SACO's challenges was completely different from Smith & Wesson's while SACO's other issue was merely a different aspect of one of Smith & Wesson's complaints.³⁴ The government witness list required only two additions. Coordination was still made through LTG. However, the office of the principal government representative in SACO was the U.S. Attorney's office in Portland, Maine, at least for the initial court appearances. After the preliminary responses involving the Temporary Restraining Order were made, responsibility was transferred to the Commercial Litigation Branch, Civil Division, DOJ, Washington, D.C. This DOJ attorney is the same one who was at the Springfield meeting mentioned above.

There was now a required duplication of effort to brief the DOJ attorney, assignment of the second RIA attorney to the case on a full-time basis, travel by attorneys and witnesses to Washington for more interviews, preparation, and depositions, as well as travel of attorneys to Maine for court appearances. Appearing in a different district court also required more "in-court" time and paper to be filed to educate the judge about the background of the procurement.

All this duplication at still more cost to the government. Additional expense incurred for challenges

the trial court characterized as "specious", that questioned facts that were "beyond any rational question", and "all [of which] were without merit."³⁵

Had one court heard both of these cases there would have been need for only one full-time RIA attorney and only one DOJ attorney. The number of trips, interviews, etc. would have been cut down, and the court would have had a basic familiarity with the procurement thereby lessening in-court time at least by not having to review basic details of the procurement action twice.³⁶ The taxpayers bore the expense of this duplicated effort.

How did it come to pass that two lawsuits over the same contract could be reviewed by two different district courts?

III. JURISDICTION IN PRE-AWARD GOVERNMENT CONTRACT
CASES PRIOR TO OCTOBER 1, 1982

A. FEDERAL DISTRICT COURT JURISDICTION -
REVIEW OF AGENCY ADMINISTRATIVE ACTIONS

1. The Federal Question

District courts find their jurisdiction over pre-award government contract cases through the statutory grant of federal question jurisdiction: "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."³⁷ Jurisdiction in cases where the Government is the defendant, however, also requires standing and a waiver of sovereign immunity.³⁸

2. Standing

In Perkins v. Lukens Steel Co.³⁹ producers of iron and steel sought to enjoin government contracting officials from administering a wage determination made by the Secretary of Labor pursuant to The Public Contracts Act of June 30, 1936.⁴⁰ The Supreme Court held that The Public Contracts Act was not intended to give "litigible rights [to] those desirous of selling

to the Government; it is a self-imposed restraint for violation of which the Government - but not private litigants - can complain."⁴¹ The respondents must show more than a vindication of the public's interest in administration of the law. They must show "injury or threat to a particular right of their own" in order to have standing to sue.⁴² It had long been a settled matter of law that the procurement regulations were for the benefit of the government and not the contractor, disappointed bidders were without standing to bring suit. This remained so until 1970.

In Scanwell Laboratories, Inc. v. Shaffer⁴³ the United States Court of Appeals for the District of Columbia Circuit took up the issue of standing in a suit brought by a disappointed bidder.

The Federal Aviation Administration (FAA) issued an invitation for bids (IFB) for instrument landing systems to be installed at airports. The purpose of these systems was to make guided landing approaches safer.⁴⁴ One provision of the IFB required that a bidder already have at least one such system installed and tested in at least one location.⁴⁵

Scanwell Laboratories had submitted the second low bid, the low bidder being Airborne Instrument Laboratory.⁴⁶ In the district court, Scanwell alleged that Airborne did not meet the requirement of having such a system installed, nor did it have a certificate of performance based on an FAA flight check.⁴⁷

Scanwell sought to have the contract declared a nullity as a violation of statutorily promulgated acquisition regulations.⁴⁸ The District Court for the District of Columbia dismissed the suit on the ground that Scanwell lacked standing to sue because Scanwell did not have a contract with the government and was seeking to adjudicate the public's interest rather than a particular right of its own.⁴⁹

In taking up the issue of standing, the appellate court first traced the history of standing to sue from 1923 through 1951.⁵⁰ It then took up the Administrative Procedure Act⁵¹ (APA), specifically section 10 of the Act.⁵² Section 10 of the APA in force at the time of the appellate argument (October 3, 1969) provided: "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."⁵³

The court held that

[i]t is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency ... It is also incontestable that the discretion may not be abused. Surely there are criteria to be taken into consideration other than price; contracting officers may properly

evaluate those criteria and base their final decisions on the result of their analysis. They may not base decisions on arbitrary or capricious abuses of discretion, however, and our holding here is that one who makes a prima facie showing alleging such action on the part of an agency or contracting officer has standing to sue under section 10 of the Administrative Procedure Act.⁵⁴

It was, the court also noted, the appellant's purpose to satisfy the public interest in having the agency follow the procurement regulations.⁵⁵

3. Waiver of Sovereign Immunity

The appellate court also dealt with the issue of sovereign immunity, another essential ingredient to successfully bring suit against the government.⁵⁶ The court concluded that Congressional intent in providing for judicial review through the APA necessitated an intent to waive sovereign immunity, as "any other construction would make the review provisions illusory."⁵⁷

Any doubt that may have remained about the waiver of sovereign immunity by the APA was removed when Congress, through a 1976 amendment,⁵⁸ virtually eliminated the defense of sovereign immunity in suits seeking nonmonetary relief against the government.⁵⁹ The APA now provides that the United States may be named as a defendant in an action seeking other than monetary damages or in which a claim is made that an agency or officer of the United States acted improperly. In such cases judgments or decrees may be entered against the United States.⁶⁰

District courts, then, find their jurisdiction over pre-award contract cases not in a contractual context, but rather as a review of agency administrative action.

B. JURISDICTION OF THE COURT OF CLAIMS OVER PRE-AWARD CONTRACT CASES

1. Standing and Waiver of Sovereign Immunity

a. The Tucker Act

Prior to October 1, 1982 those bringing suit in the Court of Claims found both standing and a waiver of sovereign immunity in the Tucker Act then codified at 28 U.S.C. § 1491:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."⁶¹

This limited jurisdiction of the Court of Claims has been interpreted to mandate "compensation by the Federal Government for the damage sustained."⁶² There was no equitable jurisdiction in the Court of Claims.

2. The Implied-In-Fact Contract

In Heyer Products v. United States⁶³ The Court of Claims heard the complaint of a disappointed bidder for damages for loss of profits and expenses incurred in bid preparation. The bid was allegedly rejected by the government as a result of arbitrary and capricious action.

As this was the action of a disappointed bidder, i.e. one not in a contractual relationship with the government, the court had to find the basis of jurisdiction. In examining the request for offers, the court found an implied condition that each of the bids

"would be honestly considered, and that the offer which in the honest opinion of the contracting officer was most advantageous to the government would be accepted."⁶⁴ It was clear to the court that a business would not spend its time and money preparing a bid that would not be honestly examined. The bidder has every right to think it will be; the government has impliedly promised that it will be."⁶⁵ The Court of Claims found jurisdiction, then, because it determined that an implied-in-fact contract exists between the bidders and the government which requires the government to give all bids "fair and honest consideration."⁶⁶

It is important to keep in mind this difference in the basis of jurisdiction between the district courts and Claims Court in analyzing the FCIA.⁶⁷

IV. THE FEDERAL COURTS IMPROVEMENT ACT OF 1982

On October 1, 1982 the Federal Courts Improvement Act of 1982 (FICA, The Act) became effective.⁶⁸ The FCIA, in amending the Tucker Act, created the Court of Appeals for the Federal Circuit, changed the name of the United States Court of Claims to the United States Claims Court, and provided the Claims Court with the jurisdiction to grant equitable relief in the area of pre-award contract disputes.⁶⁹

What improvements did Congress seek? What problems were to be solved? The House Judiciary Committee found that between 1962 and 1981 appellate court filings had increased from 4,832 to 26,362.⁷⁰ The Senate Judiciary Committee reported that the federal judicial system lacked "... the capacity, short of the Supreme Court, to provide reasonably quick and definitive answers to legal questions of nationwide significance."⁷¹ Both the House and Senate saw a need to improve the quality of the federal court system and enhance citizen access to justice.⁷² The Act created two courts, each with separate goals, to meet this over-all purpose.

A. THE UNITED STATES CLAIMS COURT

Prior to The Act the Court of Claims heard damage suits for the recovery of bid preparation costs on the grounds that they were implied-in-fact contracts. The court focused on the actions of the government contracting officers and a claimed failure to have fairly considered the bids. The Claims Court would assume this jurisdiction of the Court of Claims in exercising its new grant of equitable authority.⁷³ A major change to this jurisdiction, though, was the giving of the power to the Claims Court to grant declaratory judgments and give equitable relief in pre-award contract cases.⁷⁴

The new Claims Court is an Article I court composed of sixteen judges who are authorized to sit throughout the nation.⁷⁵ The Congressional goals in establishing this court were: 1) to provide an improved, better organized forum for government claims cases,⁷⁶ 2) to minimize the inconvenience and expense to litigants while providing a court room for judicial resolution of procurement complaints,⁷⁷ 3) to meet the needs of a cost effective and lawful government contract system,⁷⁸ and 4) to provide the Claims Court the power to act (i.e. enjoin contract award) if illegal government conduct is involved.⁷⁹

1. An Improved and Better Organized Forum

Prior to the FCIA the United States Court of Claims was comprised of Article III Judges and trial commissioners appointed by these Judges. These commissioners would exercise the trial function of the Court but were not empowered to enter dispositive orders. The judges themselves would review the decisions of the commissioners.⁸⁰ "Thus, every case, in effect [was] appealed in order to receive a final judgment even though no party expect[ed] the commissioner to be reversed."⁸¹

Under the provisions of the Act the sixteen new Article I judges will serve for a fifteen year term and be eligible for reappointment by the President.⁸² "This

represents a significant improvement in assuring the independence of the trial function over the present situation in which the trial commissioners serve at the pleasure of the judges reviewing their decisions."⁸³

The commissioners serving on October 1, 1982 became the first Article I judges of the Claims Court. These initial appointments expired on October 1, 1986.⁸⁴ The Act, then, improves the forum for government claims cases by providing an Article I trial court that may issue final judgments, and by eliminating the time and money consuming "automatic appeals" process of the Court of Claims while still providing for an appeal to an Article III court.

2. Minimizing Inconvenience and Expense

The cost of prosecuting a claim in terms of money and inconvenience to citizen-litigants was a major consideration in both the House and Senate. The House Judiciary Committee reported that "... the Claims Court is authorized to sit nationwide [and] ... is required to establish times and places of its sessions with a view toward minimizing inconvenience and expense to litigants. This is an important obligation and the Committee expects the Claims Court will take it seriously."⁸⁵ The Senate Judiciary Committee, in citing section 105 of The Act, noted that the requirement to minimize inconvenience and expense was similar to

statutory provisions relating to the United States Tax Court that require sessions be set so as to expedite citizen access.⁸⁶

This goal of Congress is clearly made a requirement of Claims Court administration by section 105 of The Act. While the District of Columbia is set as the principal place of business for the Court, the Court may sit in other places so long as the other times and places of the sessions are "... prescribed with a view to securing reasonable opportunity to citizens to appear before the Claims Court with as little inconvenience and expense to citizens as is practicable."⁸⁷

3. A Cost-Effective System

To realize the goal of meeting the needs of a cost effective government contract system Congress set the Claims Court jurisdiction as substantially that as was exercised by the Court of Claims.⁸⁸ How does this ability of the Claims Court to grant pre-award equitable relief meet the needs of a cost-effective contract system?

"Since the funds which the Government utilizes to purchase goods and services are derived solely from public sources, the public has [a] strong interest in the ability of the Government to fulfill its

requirements in these areas at the lowest possible cost."⁸⁹ Competition is a means to help achieve the lowest possible cost, but in any competition there is a winner and a loser; a selected and a not-selected. In the government contract arena with its high dollar, multi-year procurements the "not-selected" often is displeased at that turn of events and desires to have a perceived wrong made right. A disappointed bidder would most likely want award of the contract stopped until the government was made to see its error, or a declaration that the government had erred in completing the procurement action, or recovery of bid preparation costs, or a combination of the three.

The district courts, under Scanwell, could provide the injunctive and declaratory relief. Monetary relief could be provided under 28 USC § 1346(a)(2) if the amount did not exceed \$10,000. Should the amount sought exceed the statutory limit the disappointed bidder, under the terms of 28 USC § 1346, had to seek recovery in the Court of Claims. The Court of Claims could not provide the equitable relief. The potential contractor could obtain "complete" recovery only if he voluntarily kept his claim under \$10,000 (presuming it legitimately exceeded \$10,000 in the first place) and filed in a district court, or if he were to forego the injunctive relief and seek the full \$10,000-plus amount of his claim in the Court of Claims.

The expanded jurisdiction of the Claims Court now enables a citizen-litigant to obtain injunctive and

full monetary relief in one court. This ability to do some "one-stop shopping" should aid in making the contract system cost effective. The costly duplication that was required in litigation which sought money damages and injunctive relief prior to the FCIA will be avoided,⁹⁰ and the government will be able to complete the procurement process in as expeditious a manner as possible by having to deal with only one court action per contractor. The question of multiple litigants per contract will be discussed infra. If the Claims Court jurisdiction were exclusive of the federal district courts, thus eliminating the ability of plaintiffs to forum shop, the wasteful duplication illustrated in Smith & Wesson and SACO would also be eliminated.

4. The Power To Enjoin Award

Closely allied to meeting cost effective needs is the need for the Claims Court to have the power to act if illegal government conduct is involved. As discussed above, before the FCIA the Court of Claims could not provide any injunctive or equitable relief. Now, to provide "complete relief on any contract claim brought before the contract is awarded," the Claims Court may grant declaratory judgments and injunctive relief.⁹¹ If some illegal action has occurred during the procurement process it is logical to assume that the government may not be getting the lowest-priced or most cost effective contract possible. If the illegality of the conduct was

not discovered until trial in the Court of Claims no court ordered measures could be taken to halt the illegal procurement. Now, however, the Claims Court may take such a case and abate the procurement as appropriate.

In granting the Claims Court this equitable power to afford complete relief in pre-award contract cases Congress provided that "... the [Claims] [Court] shall have exclusive jurisdiction ..."⁹² Jurisdiction exclusive of the district courts would seemingly place all federal contract cases where the United States is the defendant in the Claims Court, and all appeals regarding such cases in the CAFC as Congress intended. Recent decisions, though, show that the "exclusivity" of the Claims Court's jurisdiction is open to question.

B. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Congress sought to meet four goals in creating the Court of Appeals for the Federal Circuit (CAFC): 1) to provide for the substantial improvement of the administration of law in the area of government contracts,⁹³ 2) to establish an Article III court with appellate jurisdiction over all federal contract cases in which the United States is a defendant,⁹⁴ 3) to establish an Article III court free of jurisdictional uncertainty,⁹⁵ and 4) to provide for reasonably quick and definitive answers to legal questions of nationwide significance.⁹⁶

The CAFC was established as an Article III court similar in structure to the other twelve appellate courts and not as a new tier of appellate review.⁹⁷ The composition of the circuit encompassed by the CAFC is all Federal judicial circuits⁹⁸ thereby providing the nationwide jurisdiction in those areas determined by Congress to be in special need of nationwide uniformity.⁹⁹ CAFC's jurisdiction then is to be defined by subject matter rather than by geography.¹⁰⁰ Those areas of special need have been defined by Congress as being the former jurisdictions of the Court of Customs and Patent Appeals (CCPA) and the Court of Claims.¹⁰¹ Along with the inherited jurisdiction of the CCPA and Court of Claims the CAFC would also receive "... patent appeals and all appeals in federal contract cases brought against the United States that are presently heard in the regional courts of appeals."¹⁰²

CAFC jurisdiction is dealt with in sections 122, 123, 124, and 125 of the Act.¹⁰³ "The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction ... of an appeal from a final decision of a district court of the United States, ... if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title ..." ¹⁰⁴ The CAFC has this jurisdiction unless the district court jurisdiction is based on section 1346 (a)(1) or (e) (tax appeals), section 1346 (b) (Federal Tort Claims), section 1346 (f) (quiet title actions), or section 1346 (a)(2) when the claim is based on an "Act of Congress or a regulation of an executive department providing

for internal revenue."¹⁰⁵ In the event one of these exceptions applies then 28 U.S.C. §§ 1291, 1292, and 1294 apply as appropriate.¹⁰⁶ What is left of this exclusive appellate jurisdiction found under section 1346 are appeals from claims not exceeding \$10,000 founded on the Constitution, or non-internal revenue related Congressional Acts or executive department regulations, or express or implied contracts, or for liquidated or unliquidated damages in non-tort actions; i.e. "little Tucker Act cases."¹⁰⁷

Further exclusive jurisdiction of the CAFC relating to contract cases is found in section 1295 (a)(3) (appeals from the Claims Court), and section 1295 (a)(10) (appeals from final decisions of agency boards of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978).¹⁰⁸

This jurisdiction is not enough to bring appeals of "all federal contract cases in which the United States is a defendant" to the CAFC. The Act specifically does not address those cases being reviewed by the district courts under the APA - Scanwell - type jurisdiction.¹⁰⁹ The interest of the public in having all government contract cases adjudicated through one trial-appellate level are not being met by the FCIA.

V. POST-ACT JURISIDCTION

A. "Exclusive Means Exclusive"

The inconsistency between the "exclusive" language of the Federal Courts Improvement Act and the intent of Congress expressed in the legislative history has occupied judicial attention.

The District Court for the District of Columbia decided Opal Manufacturing Company, LTD. v. UMC Industries, Inc. within two months of the effective date of The Act.¹¹⁰ In determining that it was without jurisdiction over a pre-award contract claim, the court looked to the literal language of § 1491 (a)(3).

Opal Manufacturing involved a solicitation for the purchase of postage stamp vending machines. Opal Manufacturing Company (Opal) filed suit alleging that a competitor had misappropriated proprietary information and used that information to submit a competing bid to the United States Postal Service (USPS). The USPS was not named as a defendant, but was ordered by the court to be joined in the action as an intervenor-defendant. The court also required all parties to prepare memoranda on the question of jurisdiction taking into account the recently passed Federal Courts Improvement Act.¹¹¹

In analyzing this case, the court determined that § 1491(a)(3) was applicable. Following a short review of the case law regarding examination of legislative history and notwithstanding UMC's argument that the plain language of the Act was inconsistent with the congressional intent expressed in that history, the court held that, "... the Federal Courts Improvement Act must be read to vest jurisdiction in the Claims Court for pre-award contract claims, to the exclusion of this Court."¹¹² The District Courts for the District of Columbia have followed Opal.¹¹³ The District Courts for Minnesota¹¹⁴ and Massachusetts¹¹⁵ have also followed the reasoning of Opal.

The 2d Circuit in the case of B.K. Instrument, Inc. v. United States,¹¹⁶ a case involving an action of a disappointed bidder in a post-award action, noted in dicta, "In light of 28 U.S.C. § 1491(a)(3) ... it would seem that such suits [pre-award suits] can no longer be brought except in the Claims Court."¹¹⁷

B. Exclusive Of What?

1. The Third Circuit

a. The First Appellate Look At The Act

The United States Court of Appeals for the Third Circuit, however, did look at the legislative history in deciding Coco Brothers, Inc. v. Pierce,¹¹⁸ and decided there was district court jurisdiction.

The Allegheny County Housing Authority (Authority) sought competition for a contract to construct an apartment building for the elderly in Penn Hills, Pennsylvania. A number of developers, including Coco Brothers, Inc. (Coco Bros.), submitted bids. The Authority initially accepted Coco Bros. bid. However, The United States Department of Housing and Urban Development found the bid nonresponsive, and another competitor, Crossgates, was selected.¹¹⁹

Coco Bros. filed its complaint in the U.S. District Court for the Western District of Pennsylvania on June 9, 1983. A contract between Crossgates and the Authority was not executed until December 21, 1983. At trial defendants urged that the District Court was without jurisdiction because no contract had been executed before commencement of the action. Therefore

this was a pre-award action and § 1491 (a)(3) vested jurisdiction in the Claims Court.¹²⁰ The plaintiff was unclear as to whether the complaint involved a pre- or post-award case. The District Court ruled that this was a post-award case because the complaint had been filed after another contractor had been selected, notwithstanding the fact that a contract had not been executed.¹²¹ By finding that this "constructive contract" existed the trial court was able to exercise its traditional post-award jurisdiction.

The Third Circuit Court of Appeals did not reach the question of the "constructive contract" in finding district court jurisdiction over the case. After a brief examination of the Code of Federal Regulations concerning the award of contracts, the Circuit Court determined that this District Court properly had jurisdiction regardless of the pre- or post-award nature of the claim.¹²² The Act grants "exclusive" jurisdiction, but the Third Circuit was moved to ask, "Exclusive of what?"¹²³

In answering its own question, the court turned to the legislative history. Citing the House Report¹²⁴ the court was convinced that "the district court retains jurisdiction to consider pre- and post-award government contract disputes."¹²⁵

2. The First Circuit

a. In Re Smith & Wesson¹²⁶

On November 9, 1983 the Army issued a Request for Test Samples (RFTS) as the first step in an evaluation process that would culminate in the purchase of a new armed services-wide personal defense weapon (9mm pistol).¹²⁷ Smith & Wesson responded to this request and submitted the required "test package".¹²⁸ The Army conducted its evaluation testing as was outlined in the RFTS and on September 18, 1984 issued a letter to Smith & Wesson. The manufacturer was eliminated from further testing because their weapons had failed to meet the required standards for firing pin energy and expected service life.¹²⁹ Smith & Wesson filed suit on October 23, 1984 in the United States District Court for the District of Massachusetts.¹³⁰ On December 4, 1984 Judge Freedman granted defendant's motion to transfer the case to the Claims Court based on the language of 28 U.S.C. § 1491(a)(3).¹³¹ Smith & Wesson appealed.

In an apparent effort to avoid the § 1491(a)(3) jurisdiction argument, Smith & Wesson characterized its suit as one seeking review of an agency action under the Administrative Procedure Act. The Army, however, characterized the action as being a classic pre-award case. "Since the contract at issue in the case at bar has not yet been awarded, the only court with

jurisdiction over the plaintiff's claims is the Claims Court."¹³² In dealing with this aspect of the controversy, the First Circuit turned to "the plain language of § 1491(a)(3) ('any contract claim brought before the contract is awarded')" and determined that this was "a dispute concerning the actions or inactions of an agency occurring prior to the award of a contract, and the questions raised thereby regarding the rights of the parties to such dispute."¹³³ Firmly convinced that this was a pre-award contract claim the circuit turned to the question of district court jurisdiction under the Federal Courts Improvement Act.

Turning from the characterization of the case to jurisdiction of the district court, the First Circuit also turned from reading the plain language of The Act to reading the legislative history. In determining jurisdiction the First Circuit followed the lead of the Third Circuit in reviewing the legislative history. This appellate court also determined that the term "exclusive" as used in § 1491 (a)(3) did not mean jurisdiction exclusive of the district courts and returned the case to the District Court for the District of Massachusetts for trial.¹³⁴

3. The Court Of Appeals For The Federal Circuit

a. United States v. John C. Grimberg, Co., Inc.¹³⁵

While the Court of Appeals for the Federal Circuit has not ruled directly on the matter it is possible to infer from a decision involving another dispute with FCIA aspects.

On September 29 and 30, 1982 the General Services Administration (GSA) awarded two contracts to P.W. Parker, Inc. (Parker). Bids for these contracts had also been submitted by the John C. Grimberg Company, Inc. (Grimberg) and the W.M. Schlosser Company, Inc. (Schlosser). Both Grimberg and Schlosser protested to the GSA contracting officer. The protests were acted upon and award was made to Parker.¹³⁶ Suit was filed in the United States Claims Court and on October 7, 1982 Judge Willi granted the government's motion to dismiss for lack of jurisdiction of post-award matters under § 1491(a)(3) of the Act.¹³⁷

The appellate court, in discussing jurisdiction, noted that although the, " ... complaints do not spell out the 'contract claim' relied upon, and do not refer to subsection (a)(1) [of section 1491], a fair construction indicates reliance on an implied contract to have the involved bids fairly and honestly

considered."¹³⁸ There has been no change in this "implied-in-fact contract" aspect of Claims Court jurisdiction.

In reviewing the legislative history of The Act this court does not deal directly with the controversy surrounding the "exclusive" language. Rather it is here concerned with the timing of the exercise of the jurisdiction, i.e. pre-award or post-award. In reading the various portions of the history cited by the court it becomes apparent that this court would most likely agree with the First and Third Circuits and find that "exclusive" does not mean exclusive of the district courts.¹³⁹ Because the Claims Court jurisdiction is not exclusive of the district courts, the CAFC jurisdiction over contract cases where the United States is a defendant is not exclusive of the regional circuit courts of appeals.

VI. HAVE THE CONGRESSIONAL GOALS BEEN MET?

A. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The jurisdiction of the CAFC under the FCIA does not meet the goals enunciated by Congress in the legislative history.

As discussed above, an expressed purpose of both the House and Senate was to establish an Article III court with appellate jurisdiction over all "federal contract cases" wherein the United States is a defendant. There is no doubt that the FCIA creates the CAFC as an Article III Court,¹⁴⁰ however, there are still some federal contract cases where the United States is a defendant that are appealable to the regional circuits.

Contract cases involving claims for monetary relief in amounts less than \$10,000, i.e. "Little Tucker Act" cases, may be brought in district courts under 28 U.S.C. § 1346 (a)(2); these cases are appealable exclusively to the CAFC.¹⁴¹ Contract cases with monetary claims in excess of the \$10,000 threshold amount, Tucker Act cases, may be brought in the Claims Court under 28 U.S.C. § 1491 (a)(1); these cases, too, are appealable to the CAFC.¹⁴² Final decisions of agency boards of contract appeals made pursuant to section 8 (g)(1) of the Contract Disputes Act are also to be appealed directly and exclusively to the CAFC.¹⁴³

Federal contract cases may also be reviewed by the district courts pursuant to "Federal Question Jurisdiction" and the Administrative Procedure Act.¹⁴⁴ The appeal of these decisions is not addressed in the FCIA sections organizing and charging the CAFC, consequently, these appeals are taken to the appropriate regional circuit as provided by statute.¹⁴⁵

Thus the CAFC does not have exclusive jurisdiction over all appeals of federal contract cases as specifically intended by Congress.

This then raises the question as to whether other goals, i.e. improved administration in the area of government contracts, and creating an Article III court free of jurisdictional uncertainty, have been met.

To have one appellate court providing guidance in the area of government contracts could not help but improve the administration of the law in that area. As one readily can see, there is a great prospect for disparity in decisions both from district to district and circuit to circuit with nationwide uniformity coming only through resolution by the United States Supreme Court. The idea of unity of decision is valid; the intention is good, but, it is not achieved under the current provisions of The Act. Without this unity of decision the improvement sought is also not achieved to the fullest extent possible.

In viewing certainty of jurisdiction from the perspective of clarity of language in The Act one may reasonably conclude that there is no question concerning the extent of CAFC jurisdiction. Viewed from the perspective of legislative history and intent of Congress (as the First and Third Circuits have done), The Act again falls short of achieving full success.

How has the CAFC fared in handling the caseload it has received from the Claims Court? Table one shows the number of cases acted on each fiscal year of the Court's existence.

Table 1¹⁴⁶

						TOTAL	
FY	PENDING	FILED	AFF'D	REV	DIS	ACTED ON	REMAINING
83	43	134	43	14	21	78	99
84	99	153	83	25	39	147	105
85	105	197	95	27	42	164	138
86	138	126	95	24	59	178	86

The figures in table two show a steady increase in the number of cases acted upon each year with a concomitant increase in the percentage of cases acted on relative to the total of appeals pending and filed each year.

Table 2

FY	TOTAL	TOTAL	PERCENT
	PEND & FILED	ACTED ON	ACTED ON
83	177	78	44
84	252	147	58
85	302	164	54
86	264	178	67

Using the measure of over two-thirds of the cases pending during the last fiscal year being acted upon, one may reasonably conclude that quick decisions are being rendered on questions of nationwide significance. The figures in both of the above tables include all cases, not only contract cases, heard by the CAFC.

The all-circuit encompassing composition of the CAFC means that CAFC precedent will have nationwide effect and CAFC decisions will be definitive. However, Rule 18 of the Rules of the Court of Appeals for the Federal Circuit states that "[o]pinions and orders which do not add significantly or usefully to the body of law or would not have precedential value will not be published in commercial reports of decisions."¹⁴⁷ Any order or opinion designated as unpublished may not be cited as precedent other than in narrow exceptions set forth in the rule.¹⁴⁸ The definitive effect of a decision is, of course, dependent on its availability for citation as precedent. A decision that carries weight no further than its own four corners does not settle much at all. A survey of the Federal Court Procurement Decisions reports (FPD) for Fiscal Years 1985 and 1986 reveals that of the thirty-nine procurement cases acted on by CAFC in 1985 twenty-eight of them were stamped with a legend prohibiting publication for citation as precedent. In Fiscal Year 1986 thirty-eight of the fifty-five procurement cases acted on by the CAFC were similarly noted, a drop of some three percent.¹⁴⁹ Clearly, having so many of the Court's decisions unpublished raises questions of the definitiveness of this Court's actions.

How is the Court helping to settle issues in this vital area of the law if its decisions are not to be used as precedent? Of what value is the appellate process in creating and maintaining order in a field if, virtually each case will have to be appealed on its own merits? A closer examination of these thirty-eight Fiscal Year 1986 CAFC procurement cases ordered not to be published shows that thirty-six of them, or ninety-five percent, were decisions affirming a Claims Court holding or agency board of contract appeals decision.¹⁵⁰ In most instances the CAFC determined that issues and arguments were adequately handled by the Court or board and the decision from below was adopted or used as a basis for the CAFC affirmation.¹⁵¹ The CAFC, then, provides definitive answers in both affirming already settled precedent in the vast majority of its unpublished procurement decisions and in publishing the remainder of its decisions.

There may indeed be some instances where the CAFC panel deciding a case designates the opinion as unpublished and a person, then or latter, feels the opinion should be available as precedent. In that instance Rule 18 provides that "any person" may request an opinion be reissued for publication.¹⁵² That any person may make the request is an improvement from the prior rule that it must be a party making the request.¹⁵³

Reasonably quick and definitive answers to questions of nationwide significance are being provided

by the CAFC and for the most part this goal is being met. The FCIA should be amended, however, to ensure that "all federal contract" cases may be appealed to the CAFC. The CAFC should review its custom of restricting publication and precedent.

B. THE CLAIMS COURT

Is there now an upgraded, better organized forum for the adjudication of government claims cases? As noted above, the trial commissioners of the old Court of Claims have been made judges of the new Article I Claims Court.¹⁵⁴ The raising of the trial commissioners to the status of judges in and of itself upgrades the system. The fact that these judges may render final decisions without the automatic review feature of the Court of Claims does provide for a better organized forum. The structure now exists for for a category of cases, e.g. government contract claims, to be judicially reviewed in a single track up to the U.S. Supreme Court. Of course, a government contract claim brought prior to the FCIA could be reviewed by a district court, then appealed to a regional circuit court, and argued before the U.S. Supreme Court if a petition for a writ of certiorari were granted. However, the disparity, actual and potential, in decisions from district to district and circuit to circuit existed pre-FCIA just as it does post-FCIA. Although The Act does provide, through the new Claims Court-CAFC structure, an upgraded, better organized

forum for the authoritative determination of government claims cases, there are some changes to be made to The Act which will enhance this improvement. The proposed amendment will be discussed below.

Congress enacted legislation to achieve its goal of providing to the Claims Court the power to grant declaratory judgments and provide equitable and extraordinary relief in pre-award contract cases.¹⁵⁵

The intent of Congress to minimize the inconvenience to the non-governmental party of an action is abundantly clear.¹⁵⁶ The only way to measure whether this goal has been met would be to contact each private party litigant who filed an action in a district court and inquire as to whether they still would have filed the action if the Claims Court in Washington, D.C. been the only courtroom available. Even if all such litigants would have filed what would that prove? Just because all of the litigants would file an action in Washington does not mean that all of their complaints are meritorious. The threshold question is: Do agencies of the United States do so poor a job in the pre-award stage of contracting that ninety-five courtrooms are required across the nation to handle all of the actions?

There are no published statistics available for the courts showing pre-award relief granted or denied. There are, however, published data showing General Accounting Office activity in this area:

Table 3

\ FY	1974	1975	1976	1977	1978	1979	1980	1981
PROTESTS:								
SUSTAINED	44	46	91	97	63	67	61	90
DENIED	534	493	887	723	507	387	356	391
DISMISSED*			15	151	307	275	277	396
W/DRAWN	320	554	507	435	425	391	462	506
TOTAL	898	1093	1500	1406	1302	1120	1156	1383

*FY76 was the first year in which protests were dismissed.¹⁵⁷

These figures show that in the eight fiscal years covered, protests were sustained at a rate of four percent in 1974, 1975, and 1978; five percent in 1980; and six percent in 1976, 1977, 1979, and 1981. Therefore the government action complained of was found acceptable ninety-four to ninety-six percent of the time. Assuming arguendo that half of the protests withdrawn are considered as sustained (the government may have realized a mistake or irregular action and cancelled the solicitation or award thereby giving the protestor a victory of sorts) the percentage of meritorious protests rises to a high of twenty-nine in 1975 and a low of twenty-one in 1978. Government action was regular and proper from seventy-one to seventy-nine percent of the time.

There is a need for a system of judicial review of Government contract action? The contracting system is

run by people who, no matter how dedicated and well-trained they may be, are still susceptible to human error. Not all procurement actions, therefore, will be carried out in accordance with the acquisition regulations. A system of judicial review and remedy must be in place, ready to function to help provide and maintain confidence in our procurement system. This is a necessary ingredient in a democratic society in which the government's power is constitutionally limited.

How much judicial review is really needed and how much should the taxpayers be called upon to spend to provide review of the procurement system and remedies to disappointed business enterprises? What balance should be struck between the need to redress grievances through judicial review and the direct and intangible costs of providing such redress.

Maximum scrutiny of government procurement would entail de novo review of every judgment of every bureaucrat involved in the system. Can there be any doubt that such a standard would paralyze the system?

On the other hand a bureaucracy secure in the knowledge that no decision would ever be challenged, tested or scrutinized in court or other public forum would come to exercise virtually unlimited power with all its inherent vices.

The question becomes - - how much judicial review is enough? In answering the question the following criteria should be considered:

A) agency compliance with statutes and regulations or the seriousness of the deficiency,

B) the degree of prejudice to the integrity of the competitive procurement system or to other interested parties,

C) the good faith of the parties, and

D) the cost to the government.

Is there a need for ninety-five courtrooms? No. There is no need to have a courtroom available in every federal judicial district when figures show that the vast majority of challenges to contracts are denied. Were protests sustained in more than half the cases, local availability of courtrooms might be necessary. But where, as here, the protesting party is sustained in only four to six percent of the complaints (or twenty-one to twenty-nine percent depending on how you count) there is no need to provide access to a court the location of which is based in large part on the convenience of the complainant. Assuming arguendo that half the protests withdrawn are meritorious there is even less reason to provide so many courtrooms. In these presumed meritorious protests the government has acted in good faith and responded to the review available from the GAO without having to actually go through a review by the GAO. There is no reason to go to a standard more strict than that of the GAO. To go to a standard with no presumption of regularity of

government action or that in any way increases the government's burden is not cost-effective from the perspective of the public.

Having a system of judicial review available provides the contractor the assurance of an arbitor capable of providing complete relief. The same system provides the government the motivation not only to follow the regulations from the very start, but also to review with a critical eye those procurement actions that have been challenged and to correct those found to be deficient. It is not where the relief is provided, but rather the completeness of the remedy provided that should be a key factor in determining jurisdiction. For this reason and other reasons discussed below the single track Claims Court-CAFC structure should be the exclusive arena of pre-award contract litigation.

VII. TRIAL JURISDICTION OVER PRE-AWARD CONTRACT CLAIMS

A. THE DISTRICT COURT SHOULD MAINTAIN ITS SCANWELL JURISDICTION

There are usually two major reasons given as to why the district courts should retain their federal question and APA jurisdiction over pre-award contract claims. "First, because a broader range of governmental action is reviewed by the district court under the APA

than by the Claims Court under the Tucker Act, fewer agency actions would be checked judicially. Second, disappointed bidders would not be able to sue the government in their local district court, and would be forced to travel to Washington to sue in the Claims Court."¹⁵⁸

There is some merit to the first argument. As discussed above, the district courts come to their jurisdiction in this area via the review of an agency action under the APA while the Claims Court relies on the "implied-in-fact contract" theory to review pre-award claims. If the district courts are divested of their jurisdiction with no expansion of the Claims Court jurisdiction it is unlikely that a review of such items as specifications, terms and conditions of solicitations, or the underlying activities leading to the solicitations would be available.¹⁵⁹ This is especially true if a solicitation is challenged by one not submitting a bid. There being no bid there will be no implied-in-fact contract on which the Claims Court may base its jurisdiction. This, however, is insufficient reason not to use the expertise readily available in the Claims Court when the obstacle may be overcome with an amendment to the FCIA.

Although the Claims Court may, indeed is encouraged, to sit in other places for the convenience of the litigants, it will normally sit in Washington, D.C. Obviously, should a contractor wish to file a suit in the Claims Court he would have to go to Washington.

What is so terrible about that? Keeping in mind that only a very small percentage of protests are sustained by the General Accounting Office there seems to be no valid argument to having a federal courtroom available in order to file complaints as easily as one might purchase the morning newspaper. The contracting officers and their staffs, for the most part, are executing the duties of their offices in a most satisfactory manner. It will cost something extra for a contractor to have to file an action in Washington. But will there not be a savings to the government when the number of actions drops as contractors more thoroughly review their complaints for substance?

Placing exclusive jurisdiction in an Article I Claims Court raises question of the constitutionality of that Court's power to grant injunctive relief against the United States in bid protest cases.¹⁶⁰ The Third Circuit, in Coco Brothers, raised the question of whether an Article I court with exclusive jurisdiction may enjoin or compel the activities of the Executive Branch. In finding concurrent district court jurisdiction, however, the Third Circuit ultimately did not have to consider the issue.¹⁶¹ "Congress cannot 'withdraw from [Article III] judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty.'"¹⁶² Because there is the real possibility of a constitutional infirmity to an Article I Claims Court exercising truly exclusive jurisdiction, so the argument goes, the district courts should retain the

jurisdiction they now have. This problem, like the "fewer actions reviewed" problem, may be easily corrected by making the Claims Court an Article III court through an amendment of the FCIA.

B. THE CLAIMS COURT JURISDICTION SHOULD BE
EXCLUSIVE OF THE DISTRICT COURTS

The Claims Court should have jurisdiction of pre-award contract claims exclusive of the district courts, and the FCIA should be amended accordingly.

1. Expertise of the Claims Court

The contractors, the government, and the public at large will have confidence in a court that provides judicial review of the contracting process if the members of that court have some expertise in the area. A court composed of members with some experience in government contracting will provide some consistency in their review and will not require presentations on fundamental aspects of the contracting process in each case.

There is an expertise on the Claims Court bench that may not be found on very many of the district court benches. A survey of the biographies of the

Claims Court Judges sitting as of March, 1986 shows that eight of the sixteen judges very likely had experience with government contracts before coming to the Claims Court. Two of these eight are former Army Judge Advocates. One of the eight worked for a large government contractor. Ten of the sixteen served as Trial Commissioner and/or as a division chief on the Court of Claims before October 1, 1982. One Judge served with the Office of General Counsel, General Accounting Office and as a Staff Director and Vice Chairman, U.S. Congressional Commission on Government Procurement. One Judge served as an Administrative Law Judge on the Armed Services Board of Contract Appeals immediately prior to serving as a Trial Commissioner on the Court of Claims. As of April 30, 1986 there are still eight of the Judges originally appointed to the Claims Court on the bench. Altogether there is a total of some sixty-seven years of Court of Claims experience now sitting on the Claims Court.¹⁶³

The backgrounds of the current Claims Court Judges shows that while they have the variety of experience necessary to handle the diverse cases before them, they have a strong background in government procurement. This seasoning helps develop and strengthen the expertise necessary for the sound judicial review of contract cases. But this experience will be of little value if there is a high rate of turnover among the judges.

The Claims Court is statutorily authorized sixteen judges.¹⁶⁴ Since the Court became operational on October 1, 1982 a total of twenty-three judges have been appointed; seven have left through resignation or retirement; and one sits as Senior Judge. The Senior Judge is among the eight original appointees who remain on the bench. Dates of appointment of the non-original judges are: three on December 10, 1982, one each on January 23, 1983, May 17, 1983, September 12, 1985, and two on April 14, 1986.¹⁶⁵ There is both experience and stability on the Claims Court.

District courts are courts of a much-varied and diverse subject matter jurisdiction and their judges must be able to adjudicate matters at least as complex as a government contract. Why then should the district courts not retain their jurisdiction over contract matters?

Not long after Scanwell was decided the same District of Columbia Circuit Court decided Steinthal v. Seamans¹⁶⁶ and Wheelabrator v. Chafee.¹⁶⁷ In those cases the Court spoke at length of deference to the General Accounting Office because of its years of experience in government procurement.¹⁶⁸ In speaking of the Court of Claims, the D.C. Circuit noted that the Court of Claims was a court whose "[s]pecial expertise in the field of government contracts guides us as a matter of strongest comity, if not requirement ... "¹⁶⁹ Does it not make sense to have a special category of cases reviewed by a court with a recognized special

expertise for that type of case? As one commentator has written, " ... the judges of the Claims Court have a much greater familiarity with the government contract award process than do the judges of the district court."¹⁷⁰ If the very court that first recognized district court APA jurisdiction over government contract claims also recognizes a special contract expertise in a judicial body other than the district court, then jurisdiction over all contract controversies should rest in that court, i.e. the Claims Court.

2. Processing The Caseload

The Court is able to process its contract cases caseload as is shown by the tables below:¹⁷¹

Table 4

CLAIMS COURT CONTRACT CASES FY82-FY85

FY \	PENDING	FILED	DISPOSED	REMAINING
82	451-772	290-284	264-228	477-828
83	477-828	281-262	307-612	451-478
84	451-478	339-324	289-255	501-547
85	501-547	371-357	264-256	608-648

NOTE: The first figure in Table 4 is the number of contract cases, including declaratory judgments, and the second figure is the number of plaintiffs.

Table 4A

TOTAL CLAIMS COURT CASES FY82-FY5

FY \	PENDING	FILED	DISPOSED	REMAINING
82	1796	779	797	1778
83	1778	672	829	1621
84	1621	774	774	1621
85	1621	813	669	1765

As may be seen from the above figures there are many cases involving more than one plaintiff, thus possibly adding to the complexity of the matter. It especially should be noted that in Fiscal Year 1983 while only three hundred and seven cases were disposed of, those cases included six hundred and twelve plaintiffs. Throughout the years, contract cases, including declaratory judgments, have accounted for thirty-three or more percent of the total cases disposed of. In Fiscal Year 1985 alone, the number of contract and declaratory judgment cases disposed of was approximately forty percent of the total for that year.

The Court has been able to process actions under its new power to grant declaratory judgments in a most expeditious manner:¹⁷²

Table 5

FY \	PENDING	FILED	DISPOSED	REMAINING
82	0	63	48	15
83	15	39	44	10
84	10	35	41	4
85	4	17	16	5

3. Increasing Cost-Effectiveness

Exclusive jurisdiction in the Claims Court would provide a savings in expenditure of government resources and thus be a greater step in meeting the Congressional goal of providing a cost-effective procurement system. As seen in table 4 above, there are a number of Claims Court cases with multiple plaintiffs. This should come as no surprise. The renewed emphasis on competition does lead to a greater response to the government's IFB's and RFP's. This increased response leads to more potential litigants and the judicial review process must be capable of handling the workload. As table 3 shows, the government does work acceptable to the General Accounting Office from seventy-one to ninety-six percent of the time. Thus, it must be asked, what benefits do the taxpayers derive from a system of judicial review more costly than that provided by GAO?

As the Smith & Wesson and SACO cases illustrate, the costs to the government can be enormous in defending one lawsuit. When defending more than one suit in more than one location the costs are compounded. Placing exclusive jurisdiction in the Claims Court will not end multiple suits on the same contract, but, such jurisdiction will help keep litigation costs down.

4. D.C. Law

The hiring of a Washington law firm has been suggested as a serious consideration in determining Claims Court jurisdiction. Claims Court jurisdiction, to the exclusion of the district courts " ... would, as a practical matter require all plaintiffs to retain Washington, D.C. counsel."¹⁷³ There are no reasons given as to why retaining a Washington firm is seen as a problem. Perhaps the questions to be asked are: Is contract expertise in the private bar concentrated in Washington, D.C. or are there sufficient attorneys outside the D.C. area well-versed enough in government procurement to adequately represent their clients? Would the disappointed bidders be better served by going to those attorneys more knowledgeable in government contracts even though it may cost more? How much effect should the answers to these questions have on the final determination of Claims Court jurisdiction?

Smith & Wesson was represented by a Washington, D.C. law firm yet they also retained local counsel in Springfield. SACO was also represented by a Washington law firm and they retained local counsel in Portland, ME. Two cases are certainly not enough data on which one may base a conclusion, but they are enough to question the soundness and validity of "having to retain Washington, D.C. counsel" as a criterion on which to invest jurisdiction.

VIII. CONCLUSION

Federal procurement is a big business and many companies rely heavily if not exclusively on government contracts to remain in business. The emphasis being placed not only on how much is spent but also on the quality of the goods purchased places a renewed importance on the government's responsibility to obtain the product that best meets the government's needs from the lowest, responsive, responsible bidder. This in turn gives competition a prominent place in efforts to lower government costs. The rise in competition will mean a proportional rise in the number of disappointed bidders.

The United States should, indeed must, be held accountable for following the procurement regulations, if for no other reason than to foster confidence in the

system. As noted above, a contract award on which twelve companies bid could result in eleven disappointed bidders each of whom is a potential plaintiff against the United States. In the adjudication of these claims the public has an interest in seeing that judicial scrutiny helps maintain an effective contracting system and an interest in seeing that an over-all cost-effective system is maintained. Besides being one element in an over-all cost-effective system, the judicial review process should itself be cost-effective. To help foster a cost-effective system of judicial review, jurisdiction should rest in one court. What factors should be considered in deciding which court should have jurisdiction? The four most reasonable factors are: 1) expertise in the reviewing body, 2) cost-effectiveness of the review in the overall contracting process, 3) scope of review, and 4) remedies available.

Assessing the Claims Court against these criteria in order: The Claims Court now has a demonstrated and recognized expertise in the field of government contracting. It has also demonstrated the stability of composition that will allow this expertise to grow. It would be more cost-effective to to the government (and most likely to contractors as well) in terms of resource allocation and use if a single forum were to be used for adjudication of contract controversies. The court system itself would also benefit in this area if one judge were to handle all the cases involving one procurement action. This would be possible at the

Claims Court whereas it clearly would not be possible for district courts in all instances. The scope of review of the Claims Court would have to be expanded to include 1) matters now reviewed under the APA and 2) post-award matters not cognizable by the agency boards of contract appeals. The Claims Court would then be capable of providing complete relief.

In discussing the equitable powers of the Claims Court, the House observed that "[t]he dual questions of whether these powers should even be broader and of whether they should be exclusive of the district courts will have to wait for a later date."¹⁷⁴ The later date has arrived and the powers should be expanded.

Any amendment to 28 U.S.C. § 1491 (a)(3) must clearly give the Claims Court power to conduct APA review as well as retain their implied-in-fact contract jurisdiction. This power must be extended to both pre-award and post-award contracts if the idea of complete judicial review is to be at all meaningful.

Changing the status of the Court from Article I to Article III would avoid any constitutional problem.

Given the Grimberg holding that the current 28 U.S.C. § 1491 (a)(3) gives only a new remedy for subsection 1491 (a)(1) claims and not a new subject matter jurisdiction,¹⁷⁵ an amendment should be written to "afford relief on any request for relief filed by an

aggrieved bidder or offeror relating to the award of a government contract."¹⁷⁶

The House and Senate are already considering an amendment to 28 U.S.C. § 1491 (a)(3).¹⁷⁷ The sooner an adequate amendment is passed the sooner an orderly judicial review of government contract actions will occur.

FOOTNOTES

1. FAR 19.201.
2. FAR 20.102.
3. The President's Blue Ribbon Commission on Defense Management, A Formula For Action, A Report to the President on Defense Acquisition, at 3 (April 1986).
4. Id.
5. FAR Part 14.
6. FAR Part 15.
7. FAR 14.101.
8. FAR 15.402.
9. FAR 14.101 (e); FAR Subpart 14.4; FAR 15.611 (d).
10. Heyer Products Company v. United States, 140 F.Supp. 409 (Ct. Cl. 1956); Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); United States v. John C. Grimberg Co., Inc., 702 F.2d 1362 (Fed. Cir. 1983); Keco Industries v. United States, 428 F.2d 1233 (Ct. Cl. 1970).
11. FAR 33.101.
12. FAR 33.103.
13. FAR 33.104.
14. Federal District Court jurisdiction is discussed infra at pp 13-17.
15. United States Claims Court jurisdiction is discussed infra at pp 17-19.
16. FAR 33.102 (b) (3).
17. The "interested party" entitled to standing to file a protest must be "[a]n actual or prospective bidder whose direct economic interests would be affected by

the award of a contract or failure to award a contract." 4 C.F.R. § 21.0(a). Thus, not all eleven would be considered by the GAO to have standing. Comp. Gen. Dec. B-220646 (Jan. 31, 1986), 86-1 CPD ¶ 113; Comp. Gen. Dec. B-222279.2 (Apr. 18, 1986), 86-1 CPD ¶ 386. But GSBICA decisions have not imposed the same limits. GSABICA No. 8488-P, 86-3 BCA ¶ 19,016. In any event it might be necessary to litigate the issue of standing if nothing else.

18. The successful bidder may also spend large sums of money and these costs may in some instances be passed on to the Government.
19. The author worked on both the Smith & Wesson and SACO cases while assigned to HQ, AMCCOM, RIA as a procurement law attorney. Information regarding all aspects of the Smith & Wesson and SACO cases, unless otherwise noted, comes from the author's personal knowledge as an active participant.
20. The 9mm pistol procurement differed from normal military weapon procurements in that it was basically an "off-the-shelf" procurement. The usual research and development programs were not included because this was to be the "military adaptation of a commercial item" (MACI).
21. Normally an RFP is issued. In this instance the Army had been given money only for testing and evaluation, not for the procurement itself. As there was some question as to whether purchase funds would be appropriated the decision was made to proceed cautiously. When purchase funds were available an RFP was issued as mentioned infra.

22. The manufacturers submitted written questions. A copy of the questions, less any identifying information, and the answers were given to all participants.
23. The test package submitted by each offeror included thirty weapons and supporting materials such as firing pin adapters and manuals.
24. The TEB was a creation that paralleled the RFTS, it became the Source Selection Evaluation Board when the RFP was issued.
25. The TAC was similar to the TEB. It became the Source Selection Advisory Council when the RFP was issued.
26. Statement of Milton J. Socolar, Special Assistant to the Comptroller General of the United States, Legislation and National Security Subcommittee, Committee on Government Operations, House of Representatives hearing on Department of the Army Procurement of Beretta's 9-mm. Semiautomatic Pistol as the standard military system (June 5, 1986).
27. Jaffee, How The Italians Won The West - The Anatomy Of An Arms Deal, Regardie's, 68 (May, 1985).
28. Smith & Wesson v. United States, 782 F.2d 1074 (1st Cir. 1986).
29. SACO v. Weinberger, 806 F.2d 308 (1st Cir. 1986).
30. The Army felt that the Federal Courts Improvement Act had properly settled the issue of jurisdiction over this pre-award case and that suit should have been brought in the United States Claims Court. See note 132 infra and accompanying text.

31. It is normal policy for field offices to coordinate with the appropriate branch of Litigation Division depending upon the nature of the individual case.
32. Because selection had not yet been made and because of promises made to competitors in the RFTS that test results of individual weapons would be released only to the company submitting the weapon, test reports and raw data were redacted to prevent disclosure of other competitors' test information to Smith & Wesson.
33. Smith & Wesson, 782 F.2d at 1079.
34. Smith & Wesson challenged the service life requirement vis-a-vis its own elimination while SACO attacked the same requirement vis-a-vis Beretta's not being eliminated. See SACO v. Weinberger, 629 F.Supp. 385 at 392-393.
35. SACO, 629 F.Supp. at 386, 388, 389.
36. SACO, 806 F.2d at 310. See also case category reports of the United States Claims Court. Cases are normally assigned on a random basis, but cases with the same plaintiff are routinely assigned to one judge regardless of who would be the next random selection.
37. 28 U.S.C. § 1331 (1982); Comment, Equitable Jurisdiction Over Government Contract Claims Brought Before The Contract Is Awarded, 56 U. Colo. L. Rev. 655, at 658 (1985).
38. Comment, supra note 37 at 658-659.
39. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).
40. Id. at 116.

41. Id. at 127.
42. Id. at 125.
43. Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).
44. Id. at 860.
45. Id. at 859.
46. Id.
47. Id.
48. Id. at 860-861.
49. Id. at 860.
50. Id. at 860-865.
51. 5 U.S.C. §§ 551-706 (Supp. IV 1965-1968).
52. 5 U.S.C. § 702 (Supp. IV 1965-1968).
53. Scanwell, 424 F.2d at 865 citing 5 U.S.C. § 702 (Supp. IV 1965-1968).
54. Id. at 869.
55. Id. at 864.
56. Id. at 873-874.
57. Id. at 874.
58. 5 U.S.C. § 702.
59. B.K. Instrument, Inc. v. United States, 715 F.2d 713 (2d Cir. 1983).
60. 5 U.S.C. § 702.
61. United States v. Testan, 424 U.S. 392, 397 (1976) citing 28 U.S.C. § 1491.
62. Testan, 424 U.S. at 400 quoting Eastport S.S. Corp. v. United States 372 F.2d 1002, 1009 (Ct. Cl. 1967).
63. Heyer Products Company v. United States, 140 F.Supp. 409 (Ct. Cl. 1956).
64. Id. at 412.
65. Id. at 413.

66. Id.
67. Comment, supra note 37 at 659.
68. The Federal Courts Improvement Act of 1982, § 402 (hereinafter FCIA).
69. 28 U.S.C. § 1491 (a)(1); 28 U.S.C. § 1491 (a)(3).
70. H.R. Rep. No. 312, 97th Cong. 1st Sess. 17 (1981).
71. S. Rep. No. 275, 97th Cong. 2d Sess., 3, reprinted in 1982 U.S. Code Cong. & Ad. News 13.
72. House Report, supra note 70 at 17; Senate Report, supra note 71 at 1.
73. Cecile Industries, Inc. v. United States, 2 Cl.Ct. 690 (1983).
74. Senate Report, supra note 71 at 22.
75. Senate Report, supra note 71 at 7, 8; FCIA, supra note 68 at § 105; 28 U.S.C. §§ 171, 173.
76. House Report, supra note 70 at 17.
77. Id. at 25, 32; Senate Report, supra note 71 at 13.
78. House Report, supra note 70 at 43.
79. Id. at 25.
80. Id. at 24, 25.
81. Id. at 25-26.
82. 28 U.S.C. §§ 171, 172, 176.
83. House Report, supra note 70 at 25.
84. Id.
85. Id.
86. Senate Report, supra note 71 at 13.
87. FCIA, supra note 68 at § 105, 28 U.S.C. § 173.
88. Senate Report, supra note 71 at 22.
89. House Report, supra note 70 at 43.
90. Senate Report, supra note 71 at 22.
91. 28 U.S.C. § 1491 (a) (3).

92. Id. (emphasis added).
93. House Report, supra note 70 at 17.
94. Id. at 18, 23; Senate Report, supra note 71 at 7.
95. House Report, supra note 70 at 19; Senate Report, supra note 71 at 3.
96. Senate Report, supra note 71 at 1.
97. Id. at 2; House Report, supra note 70 at 18; FCIA, supra note 68 at §§ 101, 102.
98. FCIA, supra note 68 at § 101.
99. Senate Report, supra note 71 at 2.
100. House Report, supra note 70 at 18.
101. Senate Report, supra note 71 at 3.
102. Id. at 7; House Report, supra note 70 at 23 (emphasis added).
103. FCIA, supra note 68 at §§ 122-125.
104. 28 U.S.C. § 1295 (a) (2).
105. Id.; 28 U.S.C. § 1346; House Report, supra note 70 at 42.
106. 28 U.S.C. § 1295 (a) (2).
107. 28 U.S.C. § 1346 (a) (2).
108. 28 U.S.C. § 1295 (a) (3); 28 U.S.C. § 1295 (a) (10).
109. FCIA, supra note 68 at § 127.
110. Opal Mfg. v. U.M.C. Indus., 553 F.Supp. 131 (D.D.C. 1982).
111. Id. at 132.
112. Id. at 133.
113. International Systems Division of Better Packages, Inc. v. United States Postal Service, No. 84-2043, slip op. at 5 (D.D.C. Sep. 21, 1984); Aero Corp. v. Dept. of the Navy, 558 F.Supp. 404, 409

- (D.D.C. 1983); *American District Telegraph v. Dept. of Energy*, 555 F.Supp. 1244, 1247-8 (D.D.C. 1983).
114. *London Fog Co. v. Defense Logistics Agency*, No. 4-82-1334, slip op. at 3 D. Minn. Dec. 27, 1982).
115. *Smith & Wesson v. United States*, No. 84-0390-F, slip op. at 1 (D. Mass. Dec. 4, 1984), but see *In Re Smith & Wesson*, 757 F.2d 431 (1st Cir. 1985).
116. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983).
117. Id. at 721 n. 4.
118. *Coco Bros. v. Pierce*, 741 F.2d 675 (3d Cir. 1984).
119. Id. at 676.
120. Id.
121. Id.
122. Id. at 677.
123. Id. at 679.
124. House Report, supra note 70.
125. *Coco Bros. v. Pierce*, 741 F.2d 675 at 679.
126. *In Re Smith & Wesson*, 757 F.2d 431 (1st Cir. 1985).
127. Id.
128. Id.
129. Id.
130. *Smith & Wesson v. United States*, No. 84-0930-F, slip op. (D. Mass. Dec. 4, 1984).
131. Id.
132. Brief for defendants at 6, *Smith & Wesson v. United States*, No. 84-0390-F (D. Mass. Dec. 4, 1984).
133. *In Re Smith & Wesson*, 757 F.2d 431 , 433 (1st Cir. 1985).
134. Id. at 435.
135. 702 F.2d 1362 (Fed. Cir. 1983).

136. Id. at 1363-1364.
137. Id. at 1364.
138. Id. at 1367.
139. Id. at 1369-1372.
140. FCIA, supra note 68 at §§ 101,102.
141. Id. § 127; 28 U.S.C. § 1295 (a) (2); see supra pp 26-28.
142. FCIA, supra note 68 at § 127; 28 U.S.C. § 1295 (a) (3); see supra pp 26-28.
143. FCIA, supra note 68 at § 127; 28 U.S.C. § 1295 (a) (10); see supra pp 26-28.
144. Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir 1970); see supra pp 14-16.
145. 28 U.S.C. § 1291.
146. Figures for Tables 1 and 2 are from Reports of the United States Claims Court for the court statistical years ending September 30, 1983, September 30, 1984, September 30, 1985, and September 30, 1986.
147. Fed. Cir. R. 18.
148. Id. The circumstances are: "in support of a claim of res judicata, collateral estoppel, or law of the case."
149. Copies of all CAFC procurement decisions are printed in Federal Court Procurement Decisions (FPD). The CAFC cases surveyed for this paper are found in 3 FPD, 4 FPD and 5 FPD.
150. 4 FPD ¶¶ 61, 62, 66, 71, 74, 76, 84; 5 FPD ¶¶ 1, 3, 4, 8, 9, 10, 12, 13, 14, 19, 20, 21, 22, 28, 29, 31, 32, 35, 37, 38, 44, 56, 59, 67, 72, 73, 78, 79, 89.

151. Id., see especially 4 FPD ¶84; 5 FPD ¶¶ 8, 9, 10.
152. Fed. Cir. R. 18.
153. Fed. Cir. R. 18, Fed. Cir. R. 28 U.S.C.A.
154. See supra note 75 and accompanying text.
155. 28 U.S.C. § 1491 (a)(3).
156. 28 U.S.C. § 173; House Report, supra note 70 at 25, 32; Senate Report, supra note 71 at 23.
157. R. Nash, Jr. and J. Cibinic, Jr., Formation Of Government Contracts 645 (1982).
158. Comment, supra note 37 at 661; see also Pachter, The Need for a Comprehensive Judicial Remedy for Bid Protests, 16 Pub. Cont. L. J. 47, 61-62 (1986).
159. Comment, supra note 37 at 661.
160. Pachter, supra note 158 at 62.
161. Coco Bros. v. Pierce, 741 F.2d 675 at 679 n. 4 (3rd Cir. 1984).
162. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 US 50, at 69 n. 23 (emphasis in original), citing Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 284 (1856) (emphasis added). An in-depth analysis of this issue and whether it is subject to challenge is beyond the scope of this paper. However, the problem, if any, is resolved by making the Claims Court an Article III Court as mentioned on pp 48, 58.
163. FPD ¶ 4100.
164. 28 U.S.C. § 171 (a).
165. From a survey of court personnel rosters in 1 Cl. Ct. - 10 Cl.Ct.
166. Steinthal v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971).

167. Wheelabrator v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971).
168. Wheelabrator, 455 F.2d at 1314.
169. Steinthal, 455 F.2d at 1304.
170. Shnitzer, Evolving Contractor's Remedies - The GAO, 29 Fed. B. News & J. 466 (1982).
171. Reports of the United States Claims Court for the court statistical years ending September 30, 1983, September 30, 1984, September 30, 1985, and September 30, 1986.
172. Id. One case filed during court year 1982 had two plaintiffs. This case was disposed of in the same year. All other declaratory judgment cases had only one plaintiff.
173. Pachter, supra note 158 at 62.
174. House Report, supra note 70 at 43.
175. United States v. John C. Grimberg, Co., Inc., 702 F.2d 1362 at 1366 (Fed. Cir. 1983).
176. Pachter, supra note 158 at 61.
177. Id. at 56.